

From the Bench

Should You Consent to the Magistrate Judge? Absolutely, and Here's Why

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You are probably familiar with the maxim that the wheels of justice grind slowly. As an attorney, you and your client will inevitably find yourselves in a position where you need the process to move faster. Envision a scenario where your corporate client comes to you, outraged and anxious that a former out-of-state employee has gone to work for a competitor in violation of his non-compete agreement. Not only that, but the employee appears to have downloaded confidential and sensitive company information to his home computer. Having exhausted all efforts to obtain a voluntary cease and desist, you decide to file suit in federal court to obtain a temporary restraining order (TRO) and preliminary injunction to halt the former employee's activities.

Your case comes before a district judge with a crowded docket, and she denies the motion for a TRO. She then refers discovery supervision and the motion for a preliminary injunction to a magistrate judge to conduct an evidentiary hearing and to prepare proposed findings of fact and recommendations for disposition by the district judge pursuant to 28 U.S.C. § 636(b)(1)(B). The

Judge Denlow gratefully acknowledges the assistance of his law clerk, Janelle Skaloud.

magistrate judge supervises expedited discovery and conducts an evidentiary hearing, analyzes the law, and issues a timely and well-reasoned report and recommendation (R & R) to the district judge, recommending that the preliminary injunction be granted.

However, the R & R is not legally binding and has no force or effect on its own. *See United States v. Brown*, 79 F.3d 1499, 1503 (7th Cir. 1996). Rather, the parties have up to 14 days to submit objections to the R & R to the district judge, and then another 14 days to respond to objections. Fed. R. Civ. P. 72(b)(2). The district judge then reviews the R & R de novo and issues an order accepting, rejecting, or modifying the recommended disposition, or she can return the matter to the magistrate judge with instructions or to receive further evidence. Fed. R. Civ. P. 72(b)(3). The briefing of objections, ordering of transcripts, and review of the R & R can take

months before a decision is entered by the district judge. Only when the district judge enters a ruling do the parties have an operative order. *Am. Family Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2007 WL 2377335, at *5 (N.D. Ill. Aug. 16, 2007).

Between the time the magistrate judge issues the R & R and the district judge rules, all parties will incur substantial additional expense, delay, and continued uncertainty regarding their respective legal rights and obligations. The briefing of objections can be quite expensive, and it will take the district judge a great deal of time to make a careful de novo review of the facts and the law. *See* Fed. R. Civ. P. 72(b)(3). In the meantime, your client is forced to sit by while the former employee continues working for a competitor. Substantial harm is done in the interim, much of which may not be redressable in a claim for damages. Similarly, your client's former employee and the former employee's new employer may incur liability for significant damages if it is later determined that the covenant not to compete was breached or that confidential information was misappropriated. You and your client are frustrated by the delay and expense, and you wonder how this situation could have been resolved

more promptly and at less expense for all involved.

One solution is for all parties to execute a full consent to the magistrate judge's jurisdiction to decide the entire case or to execute a limited consent to permit the magistrate judge to decide

the federal judiciary. *See* Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631–639; 18 U.S.C. §§ 3401–3402). The position was designed to create “a supplementary judicial power to meet the ebb and flow of the demands made on the Federal

as the presiding judge at the outset, but if the parties decline to consent, the action is reassigned to a district judge. District judges may also refer dispositive civil motions, motions for class certification, and preliminary injunction motions to magistrate judges for factual findings and recommendations as to disposition. 28 U.S.C. § 636(b)(1)(B). Many courts also refer Social Security appeals and prisoner cases to magistrate judges, either for adjudication with consent or for an R & R.

If the parties have a matter before a magistrate judge, but do not consent to his jurisdiction, his orders are always subject to review by the district judge. A word about this review process is helpful here, although it has been covered more extensively elsewhere. *See* Jeffrey Cole, *Reversing the Magistrate Judge*, 36 LITIGATION 2 (Winter 2010).

The mechanism for review will depend on whether the matter is dispositive of “a claim or defense of a party” or whether it is non-dispositive. A magistrate judge's ruling on a non-dispositive matter is effective at the time of the ruling. A party who loses on a non-dispositive matter has discretion to appeal the magistrate judge's order within 14 days to the district judge who made the referral. Fed. R. Civ. P. 72(a). Upon review, the district judge will set aside only any portion of the order that is “clearly erroneous or is contrary to law.” *Id.* If the party does not file any objections within the 14 days, the magistrate judge's order will stand as entered.

With a dispositive matter, on the other hand, the magistrate judge enters an R & R, which is not a binding order. The district judge's review of a recommended disposition applies a de novo standard and not a clearly erroneous standard. Fed. R. Civ. P. 72(b). The parties have 14 days after receiving the R & R to file objections, and responses to these objections must be filed no later than 14 days thereafter. Fed. R. Civ. P. 72(b)(2). The district judge must consider de novo any part of the R & R to which a party has objected. Fed. R. Civ. P. 72(b)(3). This much less deferential standard requires the district judge to come to her own determinations after review of the facts and law, although she need not hold any additional fact-finding proceedings.

Recent national statistics illustrate the increasing role of magistrate judges in assisting district judges in managing and resolving civil cases. According to

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the preliminary injunction motion. 28 U.S.C. § 636(c)(1) provides that “[u]pon the consent of the parties, a full-time United States magistrate judge . . . may conduct any and all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case” An appeal from a judgment by a magistrate judge in a consent case goes “directly to the appropriate United States Court of Appeals . . . in the same manner as an appeal from any other judgment of a district court.” 28 U.S.C. § 636(c)(3). Even if the parties do not wish to consent to the magistrate judge for the entire case, some districts allow for a partial or limited consent to the assigned magistrate judge to decide specific motions, including a motion for a preliminary injunction. Consent to the magistrate judge's jurisdiction allows the magistrate judge to decide the motion for a preliminary injunction and enter a binding order. Any appeal would proceed directly to the court of appeals in the same way as if the motion were decided by a district judge. Fed. R. Civ. P. 73(c).

The Role of Magistrate Judges in the Federal District Courts

Attorneys who practice in federal court should be aware of the magistrate judge consent process available to them to bring about the “just, speedy, and inexpensive determination” of their case. *See* Fed. R. Civ. P. 1. Magistrate judges enable the federal courts to manage increasing caseloads with limited resources. Congress originally passed the Federal Magistrates Act in 1968 to expedite the disposition of the civil and criminal caseloads of the district court, improve access to the federal courts, and increase the overall efficiency of

judiciary.” *Roell v. Withrow*, 538 U.S. 580, 588 (2003). Each district is given broad discretion as to the duties assigned to its magistrate judges.

Since 1968, Congress has amended the act several times to increase the authority of magistrate judges and improve the selection process for magistrate judges. Among the most significant changes was the grant of authority to magistrate judges in 1979 to “conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case . . .” with the consent of the parties. 28 U.S.C. § 636(c). In giving magistrate judges case-dispositive civil authority, Congress hoped to relieve the district courts’ “mounting queue of civil cases” and thereby “improve access to the courts for all groups.” *Roell*, 538 U.S. at 588. Congress also hoped to give litigants “a less formal, more rapid, and less expensive means of resolving their civil controversies.” *Id.*

Currently, there are 678 district judgeships, 523 full-time magistrate judge positions, and 41 part-time magistrate judge positions in the federal district court system. The role of magistrate judges has become increasingly important as caseloads, particularly criminal, have grown and district courts have encouraged litigants to consent to magistrate judges in civil cases. Although the responsibilities of magistrate judges vary widely from one jurisdiction to another, many courts assign civil cases to magistrate judges for pre-trial case management, including the resolution of discovery disputes and other non-dispositive motions, settlement conferences, and pre-trial conferences. Nearly one-third of the district courts assign entire cases directly to magistrate judges

statistics of the Administrative Office of the U.S. Courts for fiscal year 2009, magistrate judges resolved 11,402 civil consent cases, up from 4,958 in 1990. *Judicial Business of the United States Courts: 2000 Annual Report of the Director* tbl.S-17. Of the 11,402 consent cases resolved, 459 were a result of trial, whether by jury or a bench trial. In 2009, magistrate judges also handled 20,021 settlement conferences in civil cases, 49,150 pre-trial conferences in civil cases, and 166,899 civil motions, as well as other civil tasks. *Judicial Business of the United States Courts: 2009 Annual Report of the Director* tbls. M-4A, M-4B.

Consenting to a Magistrate Judge

A magistrate judge's workload generally originates in one of two ways: referral of matters from a district judge or consent by the parties to the magistrate judge's jurisdiction. If a district judge has referred pre-trial matters to a magistrate judge, the magistrate judge may become more familiar with the case than the district judge, and it's possible the magistrate judge may have expertise and experience in the particular type of case. You may therefore determine that full consent to the magistrate judge would be advantageous to your client, and then discuss this option with the other side. If all parties agree to consent, the magistrate judge will take over the entire case, up to and including trial and entry of judgment. In a consent case, an appeal from the magistrate judge's judgment may be taken in the same way as an appeal from a judgment by a district judge. Fed. R. Civ. P. 73(c).

Generally, if the parties decide to consent to the magistrate judge's jurisdiction, they must do so voluntarily and in writing. Fed. R. Civ. P. 73. Under certain circumstances, consent can be inferred from a party's conduct during litigation. *Roell*, 538 U.S. at 580 (parties who participated in a jury trial before a magistrate judge, after having been told of their right to trial by a district judge, are deemed to have consented to the magistrate judge even in the absence of written consent). By statute, the decision of the parties on the issue of consent is communicated to the clerk of court. 28 U.S.C. § 636(c)(2). Judges are informed of the decision only if all consent.

Alternatively, if the district judge has referred the case to the magistrate judge to issue an R & R on a dispositive

motion, a motion for preliminary injunction, or motion for class certification, you should consider executing a full consent for the entire case or a limited or partial consent to the magistrate judge to decide the motion. Consent provides a good option for parties who desire a faster and less expensive resolution of the motion. Chances are, if the district judge referred the motion to the magistrate judge, she cannot immediately devote the necessary time to decide it. After assigning it to the magistrate judge, the district judge must take time to review the magistrate judge's R & R, de novo, for any parts objected to, before making the ultimate determination. Consenting to the magistrate judge to decide the motion eliminates a potential second round of briefing and the waste of judicial time and delay. Consent brings about a faster and less expensive resolution for you

and your client, without any loss in the quality of justice. Consent also avoids the legal limbo that is created while the R & R is being reviewed by the district judge. As with full consent, limited consent must be executed in writing in districts that allow it.

Practitioners should not be concerned that they are insulting the district judge by consenting to the magistrate judge's jurisdiction. District judges do not get upset when a case is taken off their busy

calendars and reassigned to a magistrate judge. They will not run out of cases to keep them occupied.

The Quality of Magistrate Judges

The federal courts attract experienced, high-caliber attorneys, state court judges, and administrative law judges with diverse experience in civil and criminal litigation for magistrate judge positions. By statute, magistrate judges are selected through a merit selection process whereby lawyers and other residents of the judicial district comprise a merit selection panel that interviews and recommends the best qualified candidates to the court. 28 U.S.C. § 631(b)(5). The panel evaluates the applicants' scholarship, active practice of law, knowledge of the court system, personal attributes, and other criteria in making its recommendations to the court. Politi-

cal party affiliation plays no part in the merit selection process. It is not unusual for a magistrate judge opening to attract up to 80 applicants. For each opening, five qualified candidates are interviewed and voted upon by the life-tenured federal district judges, following a recommendation by the merit selection panel.

A full-time magistrate judge is appointed for a term of eight years and may be reappointed for additional eight-year terms. Given the rigorous

appointment process, litigants can be fully confident in the background, credentials, and abilities of the magistrate judges. Moreover, magistrate judges have excellent reputations among their judicial peers and generally earn the respect of both the district judges they work with and the practitioners who appear before them. Currently, magistrate judges have gone on to receive 132 Article III judicial appointments as district judges and judges on federal courts of appeals.

Firm Early Trial Dates

Parties who consent to have their case tried before a magistrate judge will generally be able to receive a firm early trial date. Magistrate judges do not try felony criminal cases, and, as a result, their trial dockets are often less crowded and they can be more flexible in their calendaring. Moreover, the right to a speedy trial in felony criminal cases requires district judges to give criminal trials priority over civil trials. As a result, pending civil cases may be pushed back to make way for a criminal trial, perhaps multiple times, depending on the district judge's criminal caseload. Therefore, you are more likely to receive a firm early trial date from a magistrate judge.

Avoiding Duplication of Effort

It simply makes sense for a motion to be decided by one judge on the basis of one set of briefs rather than two judges and two sets of briefs. When a district judge refers a motion to a magistrate judge for an R & R, the magistrate judge does everything necessary to decide the motion. He reviews the facts, studies the law, and analyzes how the case should be decided. In some instances, as with a preliminary injunction, he conducts a hearing to consider the relevant evidence. He then prepares an R & R for consideration by the district judge. The district judge must then familiarize herself with the motion, review the law, review de novo any objections submitted by the parties, and make a decision in the case. By agreeing to consent to the magistrate judge, the parties can achieve a just and more timely resolution at less expense to the clients and without a duplication of efforts by the lawyers and judges.

The referral of dispositive motions for R & Rs can result in a waste of client and judicial resources. A district judge who is thinking of referring a dispositive motion should instead encourage full or

limited consent by the parties for the magistrate judge to decide the motion. Many district courts no longer refer dispositive motions to magistrate judges as a means of making better use of their magistrate judges. Instead, they encourage parties to consent to the magistrate for all purposes. This practice benefits the parties and the court. In the Northern District of Illinois, dispositive motions are not referred. Instead, many parties consent to have their cases decided by magistrate judges.

Social Security Cases

In some districts, magistrate judges handle the bulk of the court's Social Security appeals. In 2009 alone, magistrate judges issued 4,296 R & Rs on Social Security appeals. *Judicial Business of the United States Courts: 2009 Annual Report of the Director* tbl.M4-B. Because the cases involve review of the administrative proceedings before the commissioner of Social Security, they do not require discovery and are resolved based on the administrative record. If you are a Social Security practitioner, you already know that the life cycle of a case can take years from the time your client starts the administrative appeal process. By the time the matter is brought to court, your client has likely gone a long time without much-needed benefits. Therefore, if the practice in your court is for Social Security cases to be referred to a magistrate judge for an R & R, your client will receive a faster result by consenting to the magistrate judge's jurisdiction. Because the

courts of appeals review these cases de novo, there generally is no benefit to having the case decided by means of an R & R rather than by consent. Also, for the losing side, a second "bite at the apple" under the R & R procedures is mostly an illusory benefit because, in the vast majority of instances, R & Rs are adopted by the district judge. In the Northern District of Illinois, magistrate judges are assigned Social Security cases only when the parties consent.

Class Action Certification

If you handle a lot of class action litigation, consider full or limited consent to the magistrate judge if the district judge refers the class certification motion to a magistrate judge for an R & R. An often fact-intensive inquiry, a motion for class certification will require a judge to spend considerable time reviewing all the factors to determine whether the class should be certified. At that preliminary stage, you and your client, as well as opposing counsel, need to know the outcome of the class certification motion as soon as possible so that you can decide how to proceed with the case. Consenting to the magistrate judge enables you to achieve a result more quickly than proceeding with an R & R process.

Non-Dispositive Motions in Complex Discovery Disputes

Imagine you represent a party in a complex case and you are looking at a long, protracted discovery process ahead. The district judge refers all pre-trial matters, including discovery motions, to the magistrate judge. As discussed above, without consent to the magistrate judge's jurisdiction, the parties have the option to object to any of his discovery rulings. You perceive that several hotly contested discovery issues will arise, which may well be objected to and require continuous reviews by the district judge. The prospect of stretching out the discovery process even further to wait for these intermediate reviews is daunting, and so in the interest of streamlining the process, you encourage everyone to execute a limited consent to the magistrate judge on all discovery rulings or, possibly, a full consent to take over the case.

Enforcement of Settlement Agreements

Many district courts refer cases to magistrate judges to conduct settlement
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conferences. After a magistrate judge has spent hours with the parties to help settle the case, the judge will be intimately familiar with the negotiations that have taken place and the settlement terms agreed to by the parties. Therefore, if anything should go awry with the execution or enforcement of the settlement agreement, it makes more sense for the parties to go to the judge who best understands the agreement to enforce it. If you settle a case before a magistrate judge, consider agreeing to execute the written consent form that very day to enable the magistrate judge to enforce the terms of your agreement.

Steps Courts Are Taking to Encourage Consent to Magistrate Judges

District courts are taking different individual approaches to encourage and facilitate consent to the jurisdiction of their magistrate judges. Some have adopted a direct assignment approach in which a percentage of all civil cases are assigned directly to a magistrate judge and transferred to a district judge only if the parties decline to consent

to the magistrate judge. The District of Oregon, Eastern District of Wisconsin, and Western District of Washington are examples of those using this approach. In some courts that use this approach, if the parties do not consent, the magistrate judge may still handle pre-trial matters in the case. In the Eastern District of Missouri, the court has opted for a “one judge, one case” direct assignment arrangement whereby, if consent is not obtained, the magistrate judge discontinues all involvement and the case goes entirely to a district judge. Courts that have placed magistrate judges on the assignment wheel have found that parties regularly agree to consent to the magistrate judge.

Other courts are using methods other than direct assignment to encourage consent. In the Middle District of Tennessee, a district judge’s standard order setting a scheduling conference provides that the possibility of consenting to the magistrate judge may be discussed at the initial case management conference. Others have taken steps to inform the bar about the magistrate judges and advantages of consent. Many courts facilitate consent by assigning civil cases to magistrate judges for pre-trial case management and encouraging consent after the magistrate judge has become familiar with the case.

The variety of civil consent cases handled by magistrate judges reflects the wide range of cases filed in the federal courts. While some magistrate judges may handle the bulk of certain types of cases, such as Social Security or prisoner cases, this is not a limitation on their authority. In fact, magistrate judges have disposed of all types of cases, large and small, including civil rights, patent and trademark infringement, Racketeer Influenced and Corrupt Organizations Act, contract disputes, personal injury, employment discrimination, admiralty, and many other issues. In doing so, they provide substantial assistance to the court and fulfill the intent of Congress in creating the position.

Litigants deserve justice delivered in a fair, thoughtful, and efficient manner. In the federal district court system, magistrate judges play a critical part in providing this justice to the parties that come before them. The increased use of consent to magistrate judge jurisdiction in civil cases represents one of the best ways to secure the “just, speedy, and inexpensive determination” of your client’s case. □